Supreme Court, U.S.
FILED

95-335 AUG 28 1995

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

NATIONAL ENGINEERING &
CONTRACTING COMPANY, INC.,

and

TRI-STATE STEEL CONSTRUCTION CO., INC.,
Petitioners,

v.

ROBERT B. REICH, SECRETARY OF LABOR,
Respondent,

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

KENT W. SEIFRIED
POSTON, SEIFRIED & SCHLOEMER
500 CAMPBELL TOWERS
403 YORK STREET
NEWPORT, KENTUCKY 41071
(606) 431-3200

COUNSEL FOR PETITIONERS

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO (800) 890-5001

68 pp

I

QUESTIONS PRESENTED

1. Whether an employer's due process rights are violated where an administrative law Judge conducts an evidentiary hearing but then retires from the administrative agency before issuing his decision, which decision is then adopted in full without review by the administrative agency, and is further so adopted by the reviewing appellate court.

2. Whether a willful violation of a standard promulgated under the Occupational Safety And Health Act requires proof of a greater degree of culpability on an employer's part than simple knowledge or awareness of a hazardous condition and whether such a violation is not justified if an employer has made a good faith, but not an entirely effective, effort to comply with the standard.

3. Whether the Secretary of Labor has the burden of proving all elements of his case when asserting violations of standards promulgated under the Occupational Safety and Health Act.

II

LIST OF PARTIES

The Petitioners are National Engineering & Contracting Co., Inc. and Tri-State Steel Construction Company, Inc.[1] The Secretary of Labor, Robert B. Reich is the Respondent.

---

[1] National Engineering is an employee-owned corporation, and Tri-State Steel is its wholly-owned subsidiary.

TABLE OF CONTENTS

QUESTIONS PRESENTED I

TABLE OF AUTHORITIES IV

OPINIONS BELOW 3

JURISDICTION 3

STATEMENT OF THE CASE 3

ARGUMENT 7

CONCLUSION 13

APPENDIX

Judgment of the United States Court of Appeals for the District of Columbia Circuit (App. A) 1a

Notice of Occupational Safety and Health Review Commission (App. B) 3a

Decision and Order of The Review Commission Administrative Law Judge (App.C) 6a

TABLE OF AUTHORITIES

CASES	PAGE
Brooklyn Eastern Distr. Terminal v. United States, 302 F. Supp. 1095 (E.D.N.Y. 1969).	8
Century Steel Erectors, Inc. v. Dole, 888 F.2d 1399 (D.C. Cir. 1989)	11
Matthews v. Eldridge, 424 U.S. 319 (1976)	7
National Indus. Constructors, Inc. v. OSHRC, 583 F.2d 1048 (8th Cir. 1978)	12
Secretary v. Atlantic Battery Co., 16 OSHC-BNA 213 (No. 90-1747, 1994)	9
Secretary v. Dravo Engineers & Constructors, 11 OSHC-BNA 2010 (No. 81-748, 1984)	6
Secretary v. El Paso Crane & Rigging Company, 16 OSHC-BNA 1419 (No. 1106, 1993)	12
Secretary v. Hern Iron Works, Inc., 16 OSHC-BNA 1206 (No. 89-433, 1993)	9
Secretary v. Williams Enterp., 13 OSHC-BNA 1249 (No. 85-355, 1987)	9, 10

STATUTES

5 U.S.C. §554(d) 8

28 U.S.C. §1254(1) 3

29 U.S.C. §660(a) 4

29 U.S.C. §661(e) 8

29 U.S.C. §661(j) 8

29 U.S.C. §666(a) 9

REGULATIONS

29 C.F.R. §1926.21(b)(2) 6, 11

29 C.F.R. §1926.105(a) 6, 10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

No. ____

NATIONAL ENGINEERING &
CONTRACTING COMPANY, INC.

and

TRI-STATE STEEL CONSTRUCTION CO., INC.
Petitioners,

v.

ROBERT B. REICH, SECRETARY OF LABOR
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

National Engineering & Contracting Company, Inc. ["National Engineering"] and Tri-State Steel

Construction Co., Inc. ["Tri-State Steel"] petition for a writ of certiorari to review the judgment of The United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The Judgment of the United States Court of Appeals for the District of Columbia Circuit (App.A), the Notice of the Occupational Safety and Health Review Commission (App. B), and the Decision and Order of the Review Commission and Administrative Law Judge are not published (App. C).

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. Procedural Posture

This case arose out of a two-month long inspection by the Occupational Safety and Health Administration [OSHA] of National Engineering and Tri-State Steel's construction project. OSHA issued citations to each Petitioner, which they contested. A hearing was held on November 2 through November 11, 1992, before an Administrative Law Judge ["ALJ"] of the Occupational Safety and Health Review Commission, the Hon. Edwin G. Saylers. Subsequent to the hearing, and before rendering his decision, Judge Saylers retired from the Commission. Subsequently, Judge Saylers issued a written Decision and Order which he submitted on March 25, 1994. (App. C). National Engineering and Tri-State Steel timely petitioned the Review Commission for a discretionary review of the Decision; however, the

Commission declined review on May 23, 1994 and entered its Notice rendering the Decision and Order as its final order. (App. B).

National Engineering and Tri-State Steel petitioned the United States Court of Appeals for the District of Columbia Circuit to review the Review Commission's final order. The Court of Appeals had jurisdiction of the Petition pursuant to 29 U.S.C. §660(a). The Court of Appeals cancelled oral argument scheduled for the appeal, and decided it on the Review Commission's record and the briefs of counsel. The Court entered its judgment denying National Engineering and Tri-State Steel's Petition For Review without opinion on May 30, 1995, relying solely upon the Decision of the retired administrative law judge.

B. Statement of Facts

National Engineering is a construction company and Tri-State Steel is its subsidiary. In 1990, the Ohio Department of Transportation awarded National Engineering a contract for rehabilitating the Main Avenue Bridge located over the Cuyahoga River in Cleveland, Ohio. National Engineering utilized Tri-State Steel as its iron work subcontractor on the job.

The rehabilitation work on the Main Avenue Bridge involved replacing and repairing the bridge deck, and its structural members. At one point during the project, some steel deck pans had to be adjusted to the proper height by lowering them one and one quarter inch. The project superintendent assigned the task to Tri-State Steel's ironworker foreman. The superintendent specifically instructed the foreman in the proper procedure for this task, known as "dropping the

deck pan." The administrative law judge found that the recommended procedures "if actually used, would have effectively protected the pan drop crew from a fall hazard." (App. 17a). Accordingly, the administrative law judge further noted that the foreman "was given adequate instructions by [the superintendent] in the recognition and avoidance of hazards." (App. 17a).

For some unknown reason, the ironworker foreman disregarded his clear instructions and engaged in what the administrative law judge recognized as "deviant and dangerous behavior;" i.e., he substituted an unsafe procedure. (App. 22a). As a result, when the foreman "dropped" the second deck pan, his substitute procedure failed. The foreman fell to his death, and his assistant was seriously injured. Also, unknown to the Petitioners, the foreman had failed to instruct his crew in the safe method of dropping the deck pans and, when questioned by them regarding safety, the foreman gave them false assurance that his substitute procedure was approved.

National Engineering and Tri-State Steel had a comprehensive fall protection plan in place for the Main Avenue Bridge Project, including the use of "a variety of devices (*e.g.*, saddle scaffolds, work platforms, catch platforms, snatch blocks, belts and lanyards) to protect employees from falls." (App. 42a). Additionally, the Petitioners imposed a policy requiring all employees be tied off whenever they were not otherwise secured from a fall, and provided safety belts and lanyards for this purpose. For the particular "pan dropping" operation in question, these devices were not necessary, since, as noted, the dropping procedure devised by the project superintendent, if actually used, would have effectively protected the pan dropping crew from a fall hazard.

(App. 17a).

Following the accident, and the OSHA inspection, OSHA issued serious citations against the Petitioners under 29 CFR §1926.21(b)(2), alleging that they failed to instruct the ironworker foreman and his crew regarding fall protection for the deck pan dropping operation. The controlling Review Commission precedent, Secretary v. Dravo Engineers & Constructors, 11 OSHC-BNA 2010 (No. 81-748, 1984) holds that 1926.21(b)(2) imposes only a duty to properly instruct employees as to hazards; there is no additional duty for an employer to continuously enforce its safety instructions. The administrative law judge, however, was highly critical of the Dravo precedent. (App. 18a). In essence, he ignored it. Despite finding that the ironworker foreman was properly instructed in the recognition and avoidance of a fall hazard associated with the pan dropping operation (App. 17a), the administrative law judge nonetheless sustained the serious citations against National Engineering and Tri-State Steel on the basis of the ironworker foreman's unforeseen failure to repeat his instructions to his crew.

OSHA also alleged the Petitioners violated 29 CFR §1926.105(a) for failing to provide fall protection to the pan dropping crew. The administrative law judge sustained this citation on the basis of inadequate testimony from the OSHA Compliance Officer. (App. 31a). Moreover, contrary to law, the administrative law judge shifted the burden of proof from the Secretary of Labor to demonstrate that the pan dropping instructions of the project superintendent were inadequate, to the Petitioners and imposed upon them the improper burden of demonstrating that safety belts were impractical or inappropriate for use by the pan dropping crew. (App.

31a). The administrative law judge assessed aggregate penalties of $7,000.00 and $4,200.00 against National Engineering and Tri-State Steel, respectively.

Finally, OSHA had also alleged that the Petitioners willfully violated 29 CFR §1926.21(b)(2) and 29 CFR §1926.105(a). This type of characterization allowed the Secretary to multiply the proposed penalties. Despite the facts that the Petitioners "used a variety of [safety] devices" (App. 42a) and that the "record is one in which employees were repeatedly told by the safety director, their supervisors and their foremen, that they must tie off 100 percent whenever they were not otherwise protected" (App. 39a), the administrative law judge sustained the willful violations, again without reference to any documented aggravating circumstances (§21(b)(2)), and by impermissible shifting the burden of proof on to the Petitioners. (§105(a)). The administrative law judge then assessed aggregate penalties of $50,000.00 and $30,000.00 against National Engineering and Tri-State Steel, respectively.

ARGUMENT

1. Certiorari Should Be Granted To Guarantee An Employer's Due Process Right To A Decision By A Duly Qualified Administrative Law Judge.

Due process and fundamental fairness require that a party subject to an evidentiary hearing before an administrative agency have a full opportunity to be heard by a qualified hearing examiner. Matthews v. Eldridge, 424 U.S. 319 (1976). An administrative proceeding, such as that before the Review Commission, may be conducted by a hearing examiner, such as an administrative law

judge. For example, 29 U.S.C. §661(e) authorizes the Chairman of the Review Commission to appoint administrative law judges to assist in the performance of the Commission's functions. After hearing evidence, the administrative law judge makes a determination on the matter so assigned and reports such determination to the Commission. The administrative law judge's decision becomes a final order of the Commission, unless it is timely directed for review. 29 U.S.C. §661(j).

In order for an administrative law judge's decision to become a Review Commission final order, however, the administrative law judge must be duly qualified to render his decision. If prior to the preparation of the decision the administrative law judge becomes unavailable to the administrative agency, he is no longer qualified to render the decision. 5 U.S.C. §554(d). Retirement by the administrative law judge, as occurred with the administrative law judge in this case, renders him unavailable under the statute such that he is no longer qualified to render a decision on the case. Brooklyn Eastern Distr. Terminal v. United States, 302 F. Supp. 1095 (E.D.N.Y. 1969). Thus, an employer's due process rights are violated where the retired administrative law judge subsequently submits a decision to the administrative agency.

In this case, the administrative law judge's retirement rendered his decision void. His decision could not be adopted by the Review Commission as its final order. Moreover, when the Court of Appeals accepted the Review Commission's action without further review of the administrative law judge's initial decision, National Engineering and Tri-State Steel's due process deprivation was not cured. Therefore, this Court should grant the Petition to guarantee that an employer's due

process right to a hearing by qualified administrative law judge, as further articulated in the Administrative Procedure Act and the Occupational Safety and Health Act, is secured.

2. Certiorari Should Be Granted To Establish The Criteria For A Willful Violation Of An OSHA Standard.

29 U.S.C. §666(a) authorizes the Secretary of Labor to enhance penalties for violations of OSHA's standards where the violations are determined to be willful. This term is not otherwise defined under the Act. Under the Review Commission precedent, however, in order for a violation to be willful, the Secretary must demonstrate that the violation was consciously committed "with an intentional disregard for the requirements of the Act or with plain indifference to employee safety." Secretary v. Atlantic Battery Co., 16 OSHC-BNA 2131, 2138 (No. 90-1747, 1994).

A willful violation is differentiated from other classifications under the statute, such as serious or repeat, by the employer's state of mind towards the standard's requirements. For a willful violation, an employer's underlying state of mind at the time the violation was committed requires proof of a greater degree of culpability by the employer than simply knowledge or awareness of the hazardous condition. Id. For any type of violation, the Secretary must establish the employer's knowledge of the hazardous condition. Secretary v. Hern Iron Works, Inc., 16 OSHC-BNA 1206 (No. 89-433, 1993). Knowledge alone is not sufficient to demonstrate willfulness. Moreover, a willful citation is not appropriate where the employer has made a good faith effort to act safely, even if that effort is ineffective or incomplete.

Secretary v. Williams Enterp., 13 OSHC-BNA 1249 (No. 85-355, 1987).

The Secretary of Labor opposes this construction of the law and insists that a reduced culpable mind-set by the employer will support a willful determination. The administrative law judge accepted that approach. Notwithstanding the fact that the Petitioners had repeatedly instructed employees to utilize safety equipment, and the fact that safety devices were provided throughout the project, the administrative law judge sustained the Secretary's allegations of willful violations. By accepting and ratifying the administrative law judge's opinion, the Review Commission and the Court of Appeals perpetuated this error.

Certiorari should be granted to confirm the Congressional purpose behind the willful characterization of a violation of an OSHA standard; i.e., that such an extraordinary penalty should be reserved for truly egregious conduct.

3. Certiorari Should Be Granted To Insure The Secretary Of Labor's Burden Of Proving Every Element Of His Charge That An Employer Violated OSHA's Standards.

The Secretary of Labor bears the burden of proving all elements of his case in chief. The administrative law judge, however, relieved the Secretary of that burden in this case and impermissibly shifted the burden to the Petitioners.

29 C.F.R. §1926.105(a) requires that safety nets be used if a workplace is more than 25 feet above the ground where other described safety devices are not

practical.[2] If safety nets themselves are not practical or feasible, then the Secretary has the burden of demonstrating as an essential element of his case that the use of the other referenced fall protection safeguards, such as safety belts and lanyards, is practical. Century Steel Erectors, Inc. v. Dole, 888 F.2d 1399 (D.C. Cir. 1989).

In the present case, it is undisputed that the use of safety nets on the Main Avenue Bridge project was "neither feasible or practical" due to the configuration of the bridge's structure. (App. 26a). Accordingly, the Secretary should have had the burden of demonstrating that safety belts and lanyards were practical for use by the pan dropping crew. The administrative law judge, however, erroneously reversed the burden and imposed upon the Petitioners the obligation to demonstrate that "special circumstances would make their use `impractical.' " (App. 32a).

Similarly, the administrative law judge misapplied the burden of proof under 29 C.F.R. §1926.21(b)(2). This section requires an employer to instruct employees "in the recognition and avoidance of unsafe conditions."[3]

---

[2] Section 1926.105(a) reads in full:

Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

[3] Section 1926.21(b)(2) provides in full:

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other

This command is so general, however, that in order to avoid its nonenforceability, the courts have read into it a reasonableness standard. "That is, to establish noncompliance, the Secretary must establish that the cited employer failed to provide instructions that a reasonably prudent employer would have given in the same circumstances." Secretary v. El Paso Crane & Rigging Co., 16 OSHC-BNA 1419, 1424 (No. 1106, 1993), citing National Indus. Constructors, Inc. v. OSHRC, 583 F.2d 1048 (8th Cir. 1978).

In the present case, the Petitioners' project superintendent properly instructed the ironworker foreman in the recognition and avoidance of a fall hazard associated with dropping the deck pans. (App. 17a). Thereafter, the Petitioners reasonably expected and relied upon the ironworker foreman to comply with his instructions and to so inform his crew of the safe manner in which to perform this task. This depositing of trust in the Petitioners' supervisor did not constitute unreasonable behavior, nor did the Secretary so contend or establish. Nonetheless, the administrative law judge imposed an improper burden upon the Petitioners to demonstrate its reasonableness, thereby impermissibly shifting the burden of proof on this issue and penalizing the Petitioners for their reasonable conduct.

Certiorari should be granted to certify the correct burden of proof that the Secretary bears in all OSHA proceedings – to demonstrate all essential elements of his case.

---

exposure to illness or injury.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

By: /s/ Kent W. Seifried
POSTON, SEIFRIED &
SCHLOEMER
500 Campbell Towers
403 York Street
Newport, Kentucky 41071
(606) 431-3200

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1493 September Term, 1994

National Engineering & Contracting Company, et al.,

Petitioners

v.

Department of Labor, et al.,

Respondents

Petition for Review of an Order of the Occupational Safety and Health Review Commission

Before: **SILBERMAN, WILLIAMS AND HENDERSON,** *Circuit Judges*

JUDGMENT

This case was heard on the record of the Occupational Safety and Health Review Commission (Commission) and on the briefs of counsel. The court has accorded the arguments full consideration and has

determined the issues presented occasion no need for oral argument or a published opinion. *See* D.C. Cir. Rules 34(j), 36(b). On consideration thereof, it is

ORDERED that the petition for review be denied. The court has determined that the findings of fact contained in the opinion of the administrative law judge constituting the final order of the Commission under 29 U.S.C. § 661(j) are supported by substantial evidence on the record as a whole. *See Nat'l Eng'g & Contracting Co. v. Occupational Safety & Health Review Comm'n*, 45 F.3d 476, 481 (D.C. Cir. 1995). The findings support the Commission's determinations of liability for substantially the reasons stated in the opinion and we perceive no significant misapplication of the relevant law or administrative precedent.

The clerk is directed to withhold issuance of the mandate until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(1).

Per Curiam
FOR THE COURT:
MARK J. LANGER, CLERK

APPENDIX B

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. – 9th Floor
Washington, DC 20036-3419

FAX
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket Nos. 92-1550 & 92-1551
NATIONAL ENGINEERING & CONTRACTING, INC. TRI-STATE STEEL CONSTRUCTION CO.,	:	
Respondent,	:	
IRONWORKERS' LOCAL NO. 17, Authorized Employee Representative.	:	

NOTICE OF FINAL ORDER

The petition for discretionary review filed by the Respondent, in the above cited action, was received by the Commission on May 11, 1994. The case was not directed for review. Therefore, the decision of the Administrative Law Judge became a final order of the Commission on May 23, 1994, Rule 90(d), 29 CFR § 2200.90(d); Section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(j).

ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THE ABOVE FINAL ORDER DATE. See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION
RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Date: May 25, 1994

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Benjamin Chinni, Esq.
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199
F. Benjamin Riek, III, Esq.
55 Public Square
The Illuminating Building
Cleveland, OH 44113

Willis Gallagher, Business Mgr.
Iron Workers' Local No. 17
1544 East 23rd Street
Cleveland, OH 44114

Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

APPENDIX C

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

FAX
COM (404) 347-0113
FTS (404) 347-0113

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket Nos. 92-1550 & 92-1551 (Consolidated)
NATIONAL ENGINEERING AND CONTRACTING CO., INC.,	:	
Respondent,	:	
and	:	
TRI-STATE STEEL CONSTRUCTION CO.,	:	

Respondent,	:
	:
and	:
	:
IRON WORKERS' LOCAL NO. 17,	:
	:
Authorized Employee Representative.	:

APPEARANCES:

Janice Thompson, Esquire
Office of the Solicitor
U.S. Department of Labor
Cleveland, Ohio
For Complainant

F. Benjamin, III, Esquire
Cleveland, Ohio
For Respondent

Before: Administrative Law Judge EDWIN G. SALYERS

DECISION AND ORDER

In 1990 National Engineering and Contracting Company, Inc. (National), was awarded the prime contract for rehabilitation of the Main Avenue Bridge located in Cleveland, Ohio. This bridge is over a mile in length and runs east to west over the Cuyahoga River. The height of the bridge over land and water surfaces ranged from 40 to 110 feet (Tr. 74). The contract required total reconstruction of the bridge, including the repair and/or replacement of defective structural members and the demolition and replacement of the

deck. Initially, the cost was predicted to be about 45 million dollars, but the final cost approximated 64 million dollars due in large part to the need to replace more structural members than was originally contemplated. Work began in early 1991 and was to be completed by June 1993 (Tr. 1185). The contract contained an incentive and disincentive clause which provided monetary rewards for early completion and penalties for failure to complete the contract on time (Exh. C-30; Tr. 1031). The work was actually completed in October 1992, well in advance of the imposed deadline. The contract also included a provision requiring the general contractor and all subcontractors to comply with the Occupational Safety and Health Act (the Act) (29 U.S.C. § 651, *et seq.*).

One of the steel erection subcontractors on the job was Tri-State Steel Construction Co., Inc. (Tri-State), a wholly owned subsidiary of National (Tr. 12, 41-42, 1005). Under its contract Tri-State performed the rod placement and structural steel work west of Pier 11 and the placement of all deck pans for the bridge (Tr. 41). The management of both companies are intertwined, with National playing the dominate role as the general contractor.

On February 18, 1992, two ironworkers employed by Tri-State, Louis Petrella and Richard Clark, were involved in an accident while attempting to lower a deck pan on the bridge. Petrella, a Tri-State foreman, was cutting a support weld on the pan when the pan gave way, causing him to fall 80 feet to his death. Clark, who was assisting Petrella, also fell through the hole but managed to survive by grabbing a structural member under the pan. This accident precipitate an investigation of

respondents' operations conducted by the Occupational Safety and Health Administration (OSHA) under the provisions of the Act and the standards promulgated by the Secretary.

Upon learning of the accident through media reports, the OSHA Cleveland area director dispatched Compliance Officers Edward Dill and Frank Coffelt to the scene. Upon arrival, they presented their credentials and were informed by William Bunner, the safety director for both National and Tri-State, that an inspection would not be permitted without a warrant. Dill and Coffelt proceeded to obtain a warrant which was served on respondents the following day. Although respondents attempted to impose certain restrictions on the Secretary's inspection, this matter was ultimately resolved and the Secretary's inspection was allowed to proceed.[1]

As a result of the Secretary's inspection, both respondents were issued identical citations except that proposed penalties for Tri-State were reduced due to its smaller size. Serious Citation No. 1 charges respondents in each case with a violation of 29 C.F.R. § 1926.21(b)(2), for alleged failure to adequately instruct Petrella and Clark in the recognition and avoidance of unsafe

---

[1] The Secretary contends that respondents' insistence upon a warrant reflects an obstructionist approach to the Secretary's inspection and demonstrates respondents' bad faith (Secretary's Brief, pgs. 13-15). The Secretary maintains respondents were precluded by their contractual obligations from asserting Fourth Amendment rights, citing *McLaughlin v. Kings Island*, 489 F.2d 990 (6th Cir. 1988). This judge disagrees and believes the Secretary's reliance upon *Kings Island* is misplaced. The Secretary must recognize an employer's constitutional right to request a warrant whenever the employer or its attorney deems this necessary. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S. Ct. 1816 (Sup. Ct. 1978).

conditions prior to their performing the non-routine operation of lowering the deck pans; and violations of 29 C.F.R. §§ 1926.105(a) and 1926.28(a),[2] for failure to provide appropriate fall protection in connection with the deck pan operation. Willful Citation No. 2 charges respondents with violations of 29 C.F.R. § 1926.21(b)(2), for alleged failure to adequately instruct workers engaged throughout the worksite in the recognition and avoidance of fall hazards; and 29 C.F.R. § 1926.105(a), for alleged failure to provide proper fall protection devices to employees working more than 25 feet above ground or water surfaces. The Secretary proposed aggregate penalties of $77,000 in the case of National (Docket No. 92-1550) and $46,200 in the case of Tri-State (Docket No. 92-1551). The cases were consolidated for the purpose of hearing, briefing and decision.

SERIOUS CITATION NO. 1

Item 1(a)

This item charges respondents as follows:

29 CFR 1926.21(b)(2):[3] The employer did

---

[2] This charge was added as an alternative when the Secretary filed his complaints.

[3] Section 1926.21(b)(2) provides:

> (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate

(continued...)

not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

On or before 2/18/92, two (2) employees were working at the Main Avenue Bridge site, Span 10, Beam J, engaged in the non-routine task of lowering a section of deck pans. Inadequate instructions were given to the employees as to the safe method(s) of performing this work, to include:

(1) The need for fall protection due to the nature of the work which involved the employees cutting away the securing welds to the deck pan assembly.

(2) Proper employee positioning during the lowering operation.

(3) The need for angle clips, used as hangers, to be of sufficient size to insure their contact with the ladder angle when the deck pan assembly was "dropped."

The key players involved in this charge are Ed Kersman, National's job superintendent; Simon Brandt,

---

[3](...continued)

any hazards or other exposure to illness or injury.

National's carpenter foreman; Louis Petrella, Tri-State's ironworker foreman; and Tri-State ironworkers Richard Clark, Mark Johnson and Ken Light, who assisted Petrella in the pan drop operation. The evidence reflects that none of the ironworkers, including Petrella, had previously engaged in this "non-routine" task.

Sometime in early February 1992, Kersman was made aware of a problem where a series of deck pans had been set at the wrong height near one of the expansion joints on the bridge (Tr. 1079). This situation required these pans be lowered approximately 1¼ inches to the proper grade level (Tr. 1078). On the evening before the accident, Kersman consulted with Brandt, who had previous experience in pan drop operations, and discussed a safe method for accomplishing this task (Tr. 1080-1081). Both were aware that performing to drop would entail cutting the permanent welds supporting the pans which would de-stabilize the pans and expose employees to a potential fall hazard. While the record is confusing concerning the details of Kersman's plan, it was ultimately decided that the potential fall hazard would be addressed by using 7-foot support angles[4] placed at 4-foot intervals across the top of the pan and extending over the ladders and/or stringers on either side. These support angles would then prevent the pan from falling when the permanent welds were cut (Tr. 1084-1085).[5] The use of these support angles was

---

[4] In the record this device is variously referred to as "angles," "leveling angles," etc. Hereafter, the court will use the term "support angles" when referring to this device.

[5] See also Exhibit R-59, a videotape prepared by respondents

(continued...)

essential to provide protection to the pan drop crew.

In was Kersman's testimony that on the morning of the accident, sometime between 7:30 a.m. and 8:30 a.m., he met with Brandt and Petrella to outline his plan. Kersman explained to Petrella how to weld the support angles onto the deck pans all the way across the bay, emphasizing to Petrella that support angles had to be long enough to extend over the stringers on either side of the pan and spaced at 4-foot intervals before cutting the permanent welds (Tr. 1093). Kersman questioned Petrella to be certain his instructions were understood, and Petrella replied that "he thought so." In response to this nebulous answer, Kersman informed Petrella he would go through the procedures again to be sure Petrella fully understood what was expected but was assured by Petrella that he understood the instructions (Tr. 1094). This conversation was the last contact Kersman had with Petrella since Kersman did not visit the site where the deck pans were lowered until after the accident occurred at approximately 2:00 p.m. (Tr. 1095).

Brandt also testified concerning the events leading up to the accident and his discussions with both Kersman and Petrella concerning the pan drop operation (Tr. 1720). He agreed with Kersman that the use of the 7-foot support angles was essential to protect employees when the welds were cut[6] (Tr. 1721). Brandt was present for a

---

[5](...continued)
solely as an aid to the court.

[6] Brandt had cut several of these 7-foot angles the day before the accident in anticipation that carpenters and not ironworkers would perform
(continued...)

short time on the morning of the accident when Kersman outlined the plan to Petrella but did not hear enough of the conversation to know if Kersman went "through the whole process" (Tr. 1749). Brandt met with Petrella at the pan drop site around 9:00 a.m. on the day of the accident and "went over the whole process with him" (Tr. 1731). Brandt specifically directed Petrella's attention to the 7-foot support angles which were present at the site and advised him, "That's what you weld across here, and you weld one back here before you start cutting" (Tr. 1732). At that time Brandt asked Petrella if he understood what had to be done, and Petrella advised that he did (Tr. 1734). Between 9:30 a.m. to 10:00 a.m., Brandt again returned to the area and noted that Petrella was not welding the support angles across the pan. Brandt reiterated his previous advice that the support angles must be used because "We don't want no accidents. We don't want nothing down on the street" (Tr. 1734) and advised Petrella, "Lou, you're not doing it as the plan was discussed," to which Petrella replied, "Hell, the Goddamn catwalk is down there. It will catch you" (Tr. 1736). Despite the clear indication that Petrella was not following Kersman's plan, Brandt took no further action because he had "no jurisdiction over Lou Petrella"[7]

---

[6](...continued)
the deck pan drop.

[7] The record does not disclose why Brandt visited the pan drop site on the day of the accident and found it necessary to explain the plan to Petrella in such detail, nor does it disclose why Brandt returned a second time and admonished Petrella for not following the plan. Since Kersman was Brandt's supervisor and involved Brandt in developing the plan due to his previous experience, it is reasonable to infer that Brandt was directed by

(continued...)

(Tr. 1737), nor did he report this situation to a higher authority (Tr. 1738).

It is clear beyond question that Petrella did not follow Kersman's plan. Compliance Officer Dill, together with others who examined the pan after the accident, verified that support angles were not used.

The method actually used is described in the testimony of ironworkers Clark and Johnson who assisted in dropping the pans. Neither of these workers had previously performed this type of work and received their instructions from Petrella (Tr. 600). Four 90 degree angle clips were welded to each side of the pan. These clips were approximately 2 inches by 2 inches and were supposed to catch the pan at the targeted level when the permanent welds were cut to drop the pan (Tr. 601-604). When Petrella first outlined the plan, Clark had reservations about its safety and expressed his views to Petrella who advised him, "That's the way he [Ed Kersman] wanted it done" (Tr. 605-607). One pan was dropped successfully using Petrella's method (Tr. 610-611). However, when the second drop was attempted, the clips did not catch when the permanent welds were cut causing the pan to fall and resulting in the accident (Tr. 616).

---

[7](...continued)
Kersman to oversee the pan drop and insure the plan was followed. Under this circumstance, Brandt's assertion that he lacked "jurisdiction over Petrella" is questionable. Likewise, Brandt's assertion that he lacked jurisdiction because Petrella was a member of a different union does not serve to absolve respondents of their corporate responsibilities for maintaining a safe workplace. At the very least, Brandt should have reported this circumstance to higher authority.

Johnson confirmed he received his instructions from Petrella and did not question them (Tr. 724-725). He described the clip which was utilized as "L-shaped" with the "leg of the L...probably ¾ of an inch and the back part of it probably 3 inches high and I think it was a 2-inch wide slip" (Tr. 724). He observed Simon Brandt in the area when the first pan was lowered and believed Brandt observed this operation since "he was right there. He couldn't help vut view it" (Tr. 729-730). Neither Clark nor Johnson confirmed the method used by Petrella included the use of 7-foot support angles to prevent destabilization of the pan when the permanent welds were cut. It is concluded the small clips used by Petrella were insufficient to prevent destabilization of the pan during the drop operation and that reliance upon this method was inherently dangerous. It is further found that a reasonably prudent employer would have recognized the need for fall protection when employees were engaged in such a dangerous procedure.

At trial and in their posthearing briefs, the parties devote substantial attention to a credibility question concerning Kersman's instructions to Petrella. The Secretary maintains Kersman's instructions to Petrella did not include the use of support angles and that Petrella literally followed the instructions given by Kersman and used the small clips instead of the more substantial support angles (Secretary's Brief, pg. 19). The Secretary urges the testimony of Kersman and Brandt is overcome by that of ironworker Clark to the effect that Petrella informed him [Clark] he [Petrella] was following Kersman's instructions (Tr. 605, 607) and also in similar testimony by ironworker Johnson (Tr. 723). The court has considered the Secretary's argument but finds it unconvincing. Even if the ironworkers' statements are

accepted, this hearsay evidence establishes only that Clark and Johnson were told by Petrella that he was following Kersman's instructions. It does not establish that Petrella was, in fact, following Kersman's instructions, nor does it overcome the direct testimony of Kersman and Brandt to the contrary. The court has also considered the Secretary's contentions (Secretary's Brief, pgs. 17-23) that Kersman gave inconsistent statements to Dill during the inspection and to the Secretary during his pretrial depositions, but finds the conclusions drawn by the Secretary amount to nothing more than speculation.

The credible evidence supports, and this court finds that, Kersman's instructions to Petrella included the use of support angles during the pan drop operation. It is further found that these devices, if actually used, would have effectively protected the pan drop crew from a fall hazard.[8] Having won this battle, however, does not mean respondents win the war.

The court notes the cited standard mandates an employer *"shall* instruct *each employee* in the recognition and avoidance of unsafe conditions." (Emphasis added) While the evidence establishes that Petrella was given adequate instructions by Kersman and Brandt in the recognition and avoidance of hazards, it does not support a finding that Petrella repeated these instructions to the remainder of his crew (Clark, Johnson and Light). On the contrary, these employees were given no instructions by anyone concerning the recognition and avoidance of hazards (Tr. 600, 604). Even when these ironworkers

---

[8] This point was conceded by the Secretary during the hearing (Tr. 1645).

expressed safety concerns to Petrella, they were ignored or given false assurances. This circumstance, standing alone, is sufficient to sustain a charge under the cited standard.

In their posthearing brief, respondents cite the case of *Dravo Engineers & Constructors*, 11 BNA OSHC 2010, 1984 CCH OSHD ¶ 29,930 (No. 81-748, 1984), as controlling for their argument that the cited standard imposes only a duty to instruct and not a duty to insure the instructions are followed. In *Dravo*, the evidence showed the employer had given adequate instructions to its employees concerning the danger of a swinging counterweight in the work area but took no measures to insure those instructions were followed. The evidence further reflected that company supervisors were aware employees were disregarding the instructions to stay clear of the counterweight but took no steps to stop the hazardous practice. The Commission nonetheless held that § 1926.21(b)(2) imposes only a duty to instruct and not the additional duty to enforce the instructions. The Commission declined "to rewrite the standard to impose a duty not otherwise required." *Id.* at 34,507. Commissioner Cleary wrote a strong dissent in *Dravo* in which he interprets the standard to require an employer not only to give adequate instructions but also to take effective steps to insure that the instructions are followed. Cleary noted that the majority's interpretation improperly shifts responsibility for safety and health from the employer to the employee.[9] *Id.* at 34,509.

---

[9] The undersigned takes this opportunity to express his personal opinion that *Dravo* is out of step with recent trends in Commission

(continued...)

In any event, the *Dravo* case is distinguishable from the facts of the cases at bar since, as noted above, three of the four employees engaged in the pan drop operation were given no instructions in the recognition and avoidance of unsafe conditions, a primary requirement of the standard.

Respondents argue the evidence fails to show they had knowledge of the unsafe conditions at the pan drop site. This approach ignores well-established precedent and flunks a reality test.

In *A. P. O'Horo Co., Inc.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶ 29,223 (No. 85-369, 1991), the Commission considered the knowledge question as follows:

> In order to satisfy her burden of establishing knowledge, the Secretary must prove that a cited employer either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition. *United States Steel Corp.*, 12 BNA OSHC 1692, 1699, 1986-87 CCH OSHD ¶ 27,517, p.

---

[9] (. . . continued) decisions. It nullifies the effectiveness of § 1926.21(b)(2) by allowing employers to give mere "lip service" to the important need to inform employees of the hazards which may be encountered on the job and the steps necessary to avoid these hazards. The recent case of *Pressure Concrete Const. Co.*, 15 BNA OSHC 2011, 1992 CCH OSHD ¶ 29,902 (No. 90-2668, 1992), reflects a more reasonable approach to this important standard and may signal an intention of the Commission to overturn *Dravo* and its harsh consequences. It is urged to do so in this case.

> 35,671 (No. 79-1998, 1986). The actual or constructive knowledge of an employer's foreman can be imputed to the employer. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965, 1986-87 CCH OSHD ¶ 27,651, p. 36,033 (No. 82-928, 1986). An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *Paul Betty, d/b/a Betty Brothers*, 9 BNA OSHC 1379, 1381-82, 1981 CCH OSHD ¶ 25,219, p. 31,150 (No. 76-4271, 1981); *Georgia Electric Co.*, 5 BNA OSHC 1112, 1115, 1977-78 CCH OSHD ¶ 21,613, p. 25,951 (No. 9339, 1977), *aff'd*, 595 F.2d 309 (5th Cir. 1979).

In the cases at bar, the corporate respondents had constructive knowledge of the unsafe conditions which existed at the pan drop site through the imputed knowledge of two foremen. This circumstance fully satisfies the knowledge element of proof.

Respondents argue they have established a defense of unpreventable employee misconduct. This defense was also discussed in *O'Horo, supra:*

> Once the Secretary has made a prima facie showing of employer knowledge through its supervisory employee, the employer can rebut this showing by establishing that the failure of the supervisory employee to follow proper procedures was unpreventable. In particular, the employer

> must establish that it had work rules that effectively implemented the requirements of the cited standard, and that these work rules were adequately communicated and effectively enforced. *E.g., H.E. Wiese, Inc.*, 10 BNA OSHC 1499, 1505, 1982 CCH OSHD ¶ 25,985, p. 32,614 (Nos. 78-204 & 78-205, 1982); *aff'd per curiam*, 705 F.2d 449 (5th Cir. 1983); *see Brock v. L. E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 479 (No. 87-246, 1987). *Id.* at OSHD ¶ 39,129.

Respondents made no showing that Petrella's failure to follow instructions was unpreventable or that the instructions he received from Kersman were adequately communicated to the pan drop crew and effectively enforced.

Respondents assert in their second amended answers and in their brief (Respondents' Brief, pgs. 25-30) the defense of foreman misconduct relying upon *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1986 CCH OSHD ¶ 28,335 (No. 86-351, 1986). In that case, the Secretary charged the employer with a violation of § 1910.132(a) based upon a failure of the company's foreman to require employees cleaning up a spill of hazardous chemicals to wear appropriate personal protective equipment. The Commission affirmed a violation of the cited standard and denied the company's defense of foreman misconduct on grounds that the employer failed to prove "it took all necessary precautions to prevent the violations, including adequate instructions and supervision of its supervisor." *Id.* OSHC at 1321. *Consolidated* lends no support to respondents'

claim of foreman misconduct in the cases at bar. Instead, it reinforces the Secretary's position that Petrella's deviant and dangerous behavior was known to respondents through foreman Brandt in advance of the accident, but respondents took no precautions to prevent the accident or to "supervise the supervisor." or any Serious Citation No. 1, item 1(a), is affirmed. Appropriate penalties will be discussed *infra*.

The Safety Net Question

Both respondents are charged with violations of § 1926.105(a)[10] for their alleged failure to provide fall protection to employees working "on or before 2/18/92" at heights in excess of 25 feet. Serious Citation No. 1, item 1(b), relates to employees engaged in the pan drop operation. Willful Citation No. 2, item 1(b), relates to ironworkers engaged throughout the project in "bolting up, connecting, installing ladders, installing leveling angles, etc."

Before reaching the specifics of each citation item, it is necessary to consider the current state of the law as it relates to § 1926.105(a).

---

[10] Section 1926.105(a) provides:

> (a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety belts is impractical.

In their respective briefs, the parties cite several of the many cases that have considered the complex problems of using nets to protect employees who must work on bridges or in steel erection at heights exceeding 25 feet. *L. R. Willson & Sons, Inc.*, 685 F.2d 664 (D.C. Cir. 1982) ("Wilson I"); *L. R.. Willson & Sons, Inc.*, 773 F.2d 1377 (D.C. Cir. 1985) ("Willson III"); and *Century Steel Erectors, Inc.*, 888 F.2d 1399 (D.C. Cir. 1989).

In three recent cases decided on the same day,[11] the Review Commission considered the perplexing history of the safety net standard and attempted to restore order in the face of chaos. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1990 CCH OSHD ¶ 29,055 (Nos. 89-2883 & 89-3444, 1990); *Peterson Brothers Steel Erection Co.*, 16 BNA OSHC 1196, 1993 CCH OSHD ¶ 30,052 (No. 90-2304, 1993); and *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1993 CCH OSHD ¶ 30,042 (Nos. 90-1620 & 90-2894, 1993). In each case, workers were engaged in heights in excess of 25 feet but were not continuously protected by safety nets or any of the other devices specified in the safety net standard. In each case, the Review Commission, after considering many of the same arguments raised by the parties in the cases at bar, concluded that an employer engaging employees at heights in excess of 25 feet *must* use some means of fall protection. An employer is free to choose the method of protection, but this choice must include either nets *or* one

---

[11] Since these cases were decided after the parties submitted posthearing briefs, the parties have submitted supplemental briefs concerning their significance to the cases at bar (Judges Exhs. J-70, J-71). These supplemental briefs have been read and considered by the court except for Appendix A attached to the Secretary's supplemental brief (See Exh. J-69, order dated March 23, 1994).

or more of the other methods specified in the standard. The Commission recognizes that nets are expensive and may be impractical for other reasons. In *State Sheet Metal Co., supra*, the Commission made it clear, however, that employers engaging employees at heights in excess of 25 feet cannot ignore the mandate of the standard to provide some form of protection at all times:

> We want to make it clear that we are not saying State or other members of its industry must use nets; all we are holding is that the standard requires that *some* form of fall protection be used.
>
> Because of the wording of section 1926.105(a), it has often been misunderstood. Under the terms of that standard, nets are the least-preferred means of protecting employees. If one of the other methods specified can be used, it should be used. We are familiar from past cases with various methods of protection that might be effective to protect the employees laying the roof decking. In some cases, employers have erected static lines to which a lanyard connected to a safety belt can be attached. In places where the ground was level enough, a catch platform on a mobile scaffold has been used. Given the evidence in the record as to the time and expense involved in erecting safety nets, we assume that State and its competitors will use their ingenuity to find methods of compliance other than nets.

> We want to emphasize that State is being found in violation for using *no* fall protection at all and that State could have avoided being found in violation by using *any* effective means of protection. Nets are merely one means of complying with section 1926.105(a), and the least-favored means at that. *Id.* at 1161 OSHC.

Similar conclusions were reached by the Commission in *Falcon Steel [Id.* at 1188] and *Peterson Brothers [Id.* at 1198-99]. It is also apparent from these decisions that the net question need not be reached if the evidence establishes that other methods enumerated in the standard are practical and in use. *Falcon Steel* [*Id.* at 1190][12]

The clear message delivered by the Commission in *Falcon, Peterson* and *State Sheet Metal* is one of common sense. When an employer requires employees to work in excess of 25 feet above ground level, special precautions must be taken. Section 1926.105(a) mandates employees working at such heights must be protected from fall hazards by *some* means. An employer may select any practical means to accomplish this end but cannot simply ignore the problem or leave this selection up to the independent discretion of employees.

In the cases at bar, the parties devoted substantial time and effort to establishing their respective positions

---

[12] The Commission also made it clear that the "substantial portion of the workday test" or the "not actually used test" applies only in those cases where the net issue is reached. *Falcon, supra,* at 1191-92.

concerning the feasibility or infeasibility of using nets. As previously noted, current Commission precedent makes it unnecessary to pursue this point if some other means specified in the standard is practical. In view of the ultimate conclusions reached in these cases, the net question is a "non-issue." It is, however, necessary to consider the testimony of experts called in the cases as it relates to the practicality of using other means of fall protection.

Three expert witnesses (two called by the Secretary and one by respondents) gave testimony concerning the use of nets on the project and/or the practicality of using other devices. All three ultimately agreed that the use of nets at the Main Avenue Bridge was neither feasible nor practical. They also agreed the use of the other devices specified in the standard, including belts and lanyards, were practical in these cases.

Joseph Biggers, an estimator for Senco Construction Services, whose company made an unsuccessful bid to furnish nets for the project at a cost of $840,000, believed, as a general proposition, that nets could have been installed (Tr. 347-369). On cross-examination, however, he conceded that employees engaged in the pan drop operation could not be protected by nets because of the existence of a catwalk below the main truss which would prevent a net placed above or below the catwalk from serving its intended purpose of protecting employees from falls (Tr. 440-442, 460-462) (See Respondents' Brief, pgs. 31-32, for a detailed explanation of the catwalk problem). He further conceded in the matter of other ironworkers that his initial assessment of the situation did not take into account the substantial amount of "hot work" required

for removal of pork chops and other structural members on the bridge. This circumstance would cause the nets to burn on a regular basis and would present "a difficult question to answer" (Tr. 407-415, 452-454). He finally concluded the use of "static lines, tipoffs, and other methods of protection" would be more appropriate than nets to protect workers engaged at the Main Avenue Bridge (Tr. 448-449).

Joseph Turner, assistant chief of construction, U. S. Army Corps of Engineers, Huntington Division, agreed with the Secretary that employees working above 25 feet must be protected in some fashion and that the policy of the Corps is to protect such employees "one hundred percent" (Tr. 513). His past experience in using nets, however, related solely to the placement of nets on two new bridges which did not require "rehabilitation" or significant amounts of "hot work" above the nets. Turner did not appear to be comfortable with the use of nets where they were exposed to substantial amounts of "hot work" (Tr. 484-489, 494-499, 524-527). In short, Turner's testimony concerning the use of nets on projects requiring extensive "hot work" was unconvincing and inconclusive. Turner agreed with respondents that the use of nets to protect the employees engaged in the pan drop operation was inappropriate because of the "catwalk problem" (Tr. 530-531). He also believed other forms of fall protection, "scaffolding, man baskets with tie off, safety belts and lanyards, and work platforms" were more appropriate than the use of nets on the worksite in question (Tr. 499-500).

Steven Miller, respondents' expert and president of Miller Safety Consulting Co. (Tr. 1294), embraced respondents' theory that nets were not "at all practical,

and whenever there is any means of alternative fall protection, I pursue that" (Tr. 1304). He was also in agreement with the other experts that nets were inappropriate for use in the pan drop procedure due to the "catwalk problem" (Tr. 1319-1324) and agreed with the proposition that nets were not appropriate for use at this site due to the "debris and hot work" problems (Tr. 1328-1331).

Upon consideration of the expert testimony, it is concluded the use of nets under the circumstances of these cases would have been both impractical and infeasible. The proper focus of these cases is upon the practicality of using other methods of fall protection specified in the cited standard and, in particular, the use of safety belts and lanyards.

Serious Citation No. 1

Item 1(b)

This item charges both respondents with a violation of § 1926.105(a) and, in the alternative, with a violation of § 1928(a)[13] for their alleged failure to provide any means of fall protection to employees engaged in the pan drop operation. For reasons previously given, the

---

[13] Section 1928(a) provides:

(a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to employees.

court does not consider the use of nets appropriate to protect these employees due to the "catwalk problem," nor is it necessary, under current Commission precedent, to consider the use of nets if other devices are "practical."

Based upon the evidence of record, the court is convinced the pan drop crew could have been protected by the use of safety belts and lanyards, a method which was both practical and readily available to respondents' employees.[14]

The facts concerning the pan drop operation have been recited and need not be repeated. It is clear that these employees were working at heights in excess of 25 feet but were not, at the time of the accident, protected by any means of fall protection.

Respondents concede in their posthearing brief "that neither Petrella nor Clark were wearing and/or using safety belts and lanyards at the time of the accident "but maintain these employees were protected by "a catch platform located immediately below the work area" (Respondents' Brief, pgs. 15-16). In support of this contention, respondents refer to a number of photographic exhibits (Exhs. R-8, R-12, R-14, R-15, R-18, etc.) Which purport to show a platform underneath the deck. This circumstance proves nothing in the absence of other evidence which shows some connection between the exposed employees and the use of these platforms as a means of fall protection. Respondents concede "there

---

[14] It is undisputed in the record that respondents furnished all employees with safety belts and lanyards and encouraged their use when working above 6 feet.

is no evidence as to why the platforms were located in this area." *Id.* In truth, these devices were not "catch platforms" for use as fall protection but "debris platforms" used by the laborers to collect scrap resulting from demolition of the deck. There is simply no evidence to support a conclusion these platforms were either intended for use by the pan drop crew or actually used as a means of fall protection. The presence of these platforms in the area of the pan drop was mere happenstance and bore no relationship to protecting the pan drop crew from fall hazards.

Equally without merit is respondents' contention that the steel deck pans involved in the pan drop operation served as temporary floors. This argument is valid only upon a showing that Kersman's plan was carefully followed, in which event the pans would have remained stable when cut from the permanent welds, and the crew performing the drop would experience no exposure to a fall hazard. This argument, while reflecting the exercise of ingenuity by respondents' counsel, cannot pass a reality test in view of the facts disclosed in the record.

To prove a violation of a standard under § 5(a)(2) of the Act, the Secretary must establish the following elements.:

> (1) The standard applies to the working conditions cited, (2) the terms of the standard were not met, (3) employees had access to the violative conditions, and (4) the employer knew of the violative conditions or could have known with the exercise of reasonable diligence. *Kulka*

Const. Mgt. Corp., 15 BNA OSHC 1870, 1992 CCH OSHD ¶ 29, 829 (No. 88-1167, 1992); *Astra Pharmaceutical Prods., Inc.* 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981) *aff'd*, 681 F.2d 69 [10 OSHC 1697] (1st Cir. 1982).

The first three elements are not a matter of controversy between the parties. Item 4, the knowledge element, has been previously considered, *supra*, together with respondents' defenses based upon employee and foreman misconduct in connection with Serious Citation No. 1, item 1(a), and need not be repeated.

The principal issue for resolution of this particular item is whether the record establishes that safety belts were "practical" for use by the pan drop crew. As was the case in *Falcon Steel, supra*, the Secretary in this case relies heavily upon the compliance officer's testimony to support his contention of practicality. Dill testified "the most logical" means of protecting these employees "would have been to have [them] tied off. There were places where [they] could have been tied off" (Tr. 869-870). While Dill's testimony on the point was sparse and could have been further developed by the Secretary, it went unchallenged by respondents.[15] Dill is an experienced compliance officer who has worked for the agency since its inception, received training at the OSHA Institute including training in fall protection, and has made numerous inspections of construction sites (Tr. 780-782). His opinion is entitled to "probative weight"

---

[15] Respondents offered no proof that belts were impractical or inappropriate for use by the pan drop crew.

and must prevail in the absence of challenge. (See *Falcon Steel, Id.* at 1190).

Aside from the compliance officer's testimony, however, other evidence in the case supports a conclusion that safety belts were practical. It is undisputed that respondents furnished all employees safety belts and lanyards (Tr. 868) and encouraged their use to protect against falls when no other devices were available. The use of safety belts and lanyards was respondents' method of choice for fall protection.

From this circumstance it is logically inferred that respondents considered the use of safety belts and lanyards to be "practical" in a general sense. In the absence of a showing by respondents of special circumstances which would make their use "impractical," it is concluded the use of belts was "practical" in the case of the pan drop operation. Ample evidence was developed during the course of the hearing to support a conclusion these employees could have tied off to permanent structures at the worksite or to "rat lines" which ran down the main trusses.

In addition to the compliance officer's opinion, all three experts were in agreement that the use of safety belts was a practical means of providing fall protection to members of the pan drop crew. Accordingly, the Secretary has carried his burden of proof and Serious Citation No. 1, item 1(b) is affirmed.[16]

---

[16] In view of the conclusion reached, it is unnecessary to consider the alternative charge under § 1926.28(a).

SERIOUS CITATION NO. 1

Classification and Penalties

Section 17(k) of the Act provides a violation is serious if there is a substantial probability that death or serious physical harm could result. As construed by the Commission, this provision "does not mean that the occurrence of an accident must be a substantially probably result of the violative condition but rather that a serious injury is the likely result should an accident occur. *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1315, 1991 CCH OSHD ¶ 29,498 at 39,804 (No. 89-2253, 1991). Under the facts of this case, the Secretary has appropriately classified the violations as serious.

Section 17(j) of the Act provides that the Commission shall assess an appropriate penalty for each violation giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. These factors have been considered by the Secretary (Tr. 872) and by the court. It is concluded the Secretary's proposed penalties are appropriate and will be imposed as follows:

(1) In Docket No. 92-1550 (National), an aggregate penalty of $7,000.

(2) In Docket No. 92-1551 (Tri-State), an aggregate penalty of $4,200.

WILLFUL CITATION NO. 2

Item 1(a)

This item charges respondents as follows:

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury.

On or before 2/18/92, employees working at the Main Avenue Bridge site, were not properly instructed on fall protection. Although the company's stated position was to require employees to tie-off whenever working at elevations exceeding six (6) feet where fall hazards existed, supervisory personnel and ironworkers acknowledged the infeasibility of tie-off in certain situations, e.g., connecting, transporting materials relating to bolting-up, installing ladders, and moving from point-to-point. Furthermore, ironworkers were instructed and/or permitted to utiiize safety blocks ("snatch blocks"), retractable lifelines, that were connected to horizontal static lifelines thereby allowing the worker to travel up to 26 feet (20' retractable line plus 6' lanyard) from the point of connection and fall a like distance. This usage is contrary to manufacturers

> specifications where such retractable devices are to be installed above the worker and used within 30 degrees of the vertical to eliminate a pendulum effect occurring after a fall.

It is noted at the outset that respondents had a safety program[17] administered by a full-time safety director, William Bunner.[18] This program included weekly tool box meetings with employees conducted by foremen in which safety was discussed. Each employee was furnished a safety belt and lanyard at the time of employment and was told to use these devices whenever exposed to a fall hazard in excess of 6 feet. Other safety devices provided at the worksite included rat lines (wire cable strung at a height of 42 inches between stanchions at intervals of 20 feet), which ran east to west on the main trusses and served as a tie-off point for employees moving over the trusses, retractable lanyards, which were used by employees moving north or south to work on the stringers, pork chops, facie beams and saddle scaffolds, which were used by employees bolting up or detailing the floor beams, pork chops and facie beams. It is clear in the record that respondents' announced policy (as expressed by Bunner and others) required all employees to be protected at all times by some form of fall protection. It is equally clear this policy was not followed in practice by a significant number of ironworkers before

---

[17] The written program was referred to in the record but was not offered into evidence.

[18] Bunner assisted respondents' counsel throughout the trial and was designated as a witness on respondents' witness list. He was not, however, called to testify.

the accident and that respondents' management personnel were aware of this fact but took no effective steps to insure the policy was followed.

This problem is discussed in the testimony of John Deluca, National's vice-president and general field superintendent, who worked with Bunner to develop a fall protection program for the project (Tr. 2041). They considered the use of nets but rejected that method due to the "hot work and debris" problem (Tr. 2041-2045) and decided to use other means (Tr. 2046). A key element of their plan was "100% tie off" when workers were not otherwise protected. In December 1991, Deluca was told by Bunner "that our foremen and their people, the ironworkers, for all practical purposes were not tying off on the project. They weren't following our safety procedures" (Tr. 2051). Deluca and Bunner went to the worksite and discussed the problem with the foremen and their supervisors. The trade primarily involved was the ironworkers who maintained "their trade did not require tying off at all times" (Tr. 2052). This problem was temporarily resolved by instructing the foremen and their supervisors to follow the tie-off rule "at all times" but exempting the connectors from the rule when the steel "was being swung in" (Tr. 2053). A second confrontation with the ironworkers occurred in late January 1991 when the ironworkers walked off the job in protest to their perception that respondents "were trying to work too safely" (Tr. 2053). Deluca and Bunner again discussed this matter with the involved foremen, their supervisors, and Ted Sheppard, president of Tri-State, and reiterated the company policy that everyone would tie off at all times (Tr. 2055).

Kersman also confirmed the company policy

requiring 100 percent tie-off when employees were not otherwise protected (Tr. 1045). He testified this policy was communicated to employees through their foremen who had the primary responsibility for enforcement of the rule. Whenever he observed employees who were not tied off, he would "remind the foreman that they had to be tied off" and the foremen would "normally" correct the problem (Tr. 1034). He acknowledged the resistance of ironworkers to the tie-off rule and attributed this to their "macho image" (Tr. 1037). Persuasion was the method used to obtain compliance, but this method was ineffective since respondents had no disciplinary program (except verbal warnings) to aid in the enforcement of the rule (Tr. 1037). Kersman testified his only recourse was to fire the violators, a method he did not choose to follow (Tr. 1038). Kersman reiterated on cross-examination that the 100 percent tie-off policy applied to all operations on the bridge, but "there were ironworkers that did not follow the policy at times" (Tr. 1208). He also conceded respondents had no disciplinary program except verbal warnings which were not documented. *Id.*

Robert Schumacher, the union steward for Tri-State ironworkers, was on the jobsite during the pertinent period (Tr. 49). Because of his union duties, he was aware of the everyday activities throughout the worksite (Tr. 51-53). He confirmed that ironworkers and their supervisors were instructed by Bunner to follow the company rule requiring 100 percent tie-off when not protected from fall hazards by some other means (Tr. 128). It was Schumacher's opinion, shared by other ironworkers and their supervisors, that 100 percent tie-off

was impractical and would slow up the work (Tr. 129).[19] He did not dispute, however, the tie-off rule was company policy or that employees were instructed to follow the rule. He was firm in his testimony that the rule was regularly violated by ironworkers, estimating that the detail crew alone violated the rule 50 percent of the time while in full view of their foremen and supervisors (Tr. 165-166). He also confirmed no one was disciplined for violating the rule until after the accident (Tr. 166).

Based upon the evidence of record, the court makes the following findings:

(1) Respondents had knowledge of the fall hazards expected to be encountered in rehabilitating the Main Avenue Bridge and were aware of their obligation to instruct employees in the recognition and avoidance of these hazards.

(2) Respondents' fall protection plan for the project included the use of various devices, *e.g.*, catch platforms, saddle scaffolds, work platforms, etc., whenever appropriate. Respondents recognized, however, the use of these devices would not protect employees from fall hazards at all times.

(3) Safety Director Bunner, after consultation with top management, devised a policy which required respondents' employees working on the bridge to be tied off 100 percent of the time when not otherwise protected

---

[19] Schumacher disclosed a practice where employees were warned in advance of Bunner's visits so when he showed up, "everybody would be tied off" (Tr. 130). The same subterfuge as used when OSHA inspectors visited the site. *Id.*

from falls.

(4) This policy was communicated by Bunner to respondents' supervisors and foremen who relayed these instructions directly to employees.

(5) Respondents provided employees with safety belts and lanyard which could be used for tying off to permanent structures at the work station or could be hooked to rat lines running east to west while traveling the main trusses of the bridge. Respondents provided some retractable lanyards (snatch blocks) which could be attached to the rat lines and used for fall protection when moving in a north/south direction over the floor beams.

(6) While employees were instructed by respondents to tie off at all times, significant numbers (especially ironworkers) regularly violated the rule, and this circumstance was known by foremen, supervisors and top officials of both companies.

(7) No effective measures were taken by respondents to rectify this condition until after the accident occurred.

In their brief, respondents again cite *Dravo, supra,* in support of their position that this item should be vacated. Unlike the situation with the pan drop crew where the evidence disclosed respondents' failure to give any instruction to three of the four crew members, no such distinction is available here. The picture emerging from this record is one in which employees were repeatedly told by the safety director, their supervisors and their foremen that they must tie off 100 percent whenever they were not otherwise protected. These

instructions were ignored by numerous employees with the complicity of their supervisors, and the dangerous practice continued since no effective discipline was imposed.[20] The facts of this case are a textbook example of the results which can be expected if the *Dravo* decision is allowed to stand. The undersigned respectfully renews the suggestion that *Dravo* be reversed. Until this occurs, however, this court is bound to follow *Dravo*. That portion of Willful Citation No. 2, item 1(a), which relates to respondents' failure to give tie-off instructions is vacated and this circumstance will be considered in assessing appropriate penalties.

The remaining matter for consideration is the Secretary's contention that employees were not instructed in the proper use of retractable lanyards ("snatch blocks"), a device connected to the rat lines on the main trusses to protect workers traveling in a north/south direction over the floor beams to their work stations on the outer edges of the beams.

The manufacturer's instruction manual concerning the use of these devices was received into evidence as Exhibits C-24 and C-32. This manual reflects the need to instruct employees in the proper use of the device and recommends it be attached above the head of its user to prevent a possible "pendulum effect" in the event of a

---

[20] There is a strong suggestion in the record that everyone in respondents' organization from top management down to foremen and workers were motivated to short-cut safety due to the pressures created by the "incentive-disincentive" clause in the contract. Kersman denied this (Tr. 1031-1032), and the point was not fully developed in the record. While the court makes no findings in this regard, this theory, if true, would explain many of the unanswered questions in the case.

fall. It is undisputed in the record that these devices were used in the horizontal position, *i.e.*, tied off to the rat lines installed on the main trusses. Even respondents' expert on the subject agreed the use of "snatch blocks" in the horizontal mode was not safe (Tr. 1685). It is noted, however, that the Secretary's expert, Joseph Turner, testified snatch blocks were an acceptable means of fall protection when used properly and were in general use at TVA projects (Tr. 500-501). Based upon the evidence, it is concluded an employer choosing to use snatch blocks is required to instruct employees in their proper use, including the proper placement of these devices to avoid the "pendulum effect."

It is clear in the record that respondents did not instruct employees in the proper use of retractable lanyards. This fact is verified in the testimony of Schumacher, Muscovic, Clark, Johnson and Dunham (Tr. 126, 301, 591, 696, 714, 1412). In view of this conclusion, item 1(a) of Willful Citation No. 2 will be affirmed as it relates to a failure to instruct employees in the safe use of retractable lanyards.

WILLFUL CITATION NO. 2

Item 1(b)

This item charges respondents with a willful violation as follows:

> 29 CFR 1926.105(a): Safety nets were not provided when workplaces were more than 25 feet above the ground or water surface, or other surface(s) where the use of

> ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts was impractical:
>
> On or before 2/18/92, employees working at the Main Avenue Bridge site performing such tasks as: bolting up, connecting, installing ladders, installing leveling angles, etc., were not protected at all times from fall hazards exceeding 25' by the use of fall protection such as: safety belts/lanyards, catch platforms and/or nets. Safety belts and lanyards were available, however, their use was deemed infeasible during certain phases of these jobs. No alternative protection was provided. Furthermore, when tie-off was used, it was sometimes used in conjunction with retractable lifelines ("snatch blocks"), connected to horizontal lifelines. As used, the retractable lifeline extended the horizontal distance a worker could travel up to 20 degrees, thereby creating the possibility of a pendulum effect in the event of a fall.

As previously discussed, it is unnecessary to reach the net issue if the evidence reflects employees could have been protected by the use of other devices identified in the standard. There is no dispute respondents used a variety of devices (*e.g.*, saddle scaffolds, work platforms, catch platforms, snatch blocks, belts and lanyards) to protect employees from falls. The Secretary maintains, and the evidence confirms, employees engaged in bolting up, installing ladders and leveling angles, and in moving

point-to-point over the beams and trusses,[21] were not protected by any of these devices on numerous occasions and for significant periods.[22] The key element of respondents' fall protection plan was the "100 percent tie-off rule," which rule was ignored by many of respondents' supervisors, foremen and employees despite the repeated efforts of the safety director to enforce the rule. In essence, respondents allowed "the tail to wag the dog."

In view of what has been previously discussed, it is unnecessary to dwell at length upon the practicality of using safety belts and lanyards. This was the method of choice selected by respondents' management for use

---

[21] In their brief, respondents object to any consideration of the "point-to-point" issue on grounds that this activity was not specifically referenced in the Secretary's citation (Respondents' Brief, pgs. 55-56). Respondents acknowledge the Secretary's use of the term "etc." in the citation but argue that respondents were provided insufficient notice of the issue and have been prejudiced in their defense. This argument is rejected. The "point-to-point" issue was specifically referenced by the Secretary in connection with the charges brought under Willful Citation No. 2, item 1(a). The issue was addressed by both parties in their presentation of the evidence. Accordingly, the issue was tried by actual or implied consent, respondents had sufficient time to develop a defense during the nine-day trial, and no prejudice has been shown.

[22] The Secretary also urges that connectors were not tied off while moving in the steel, and the record confirms this fact. Respondents argue, however, that industry custom and practice recognizes an exception for connectors based upon their need to be unrestrained during the operation (Respondents' Brief, pgs 59-60). Respondents further argue the Secretary has acquiesced in the practice and introduced several OSHA opinion letters to this effect (Exhs. R-43, R-49, R-50), together with the testimony of James Vaughan, a former area director for OSHA in Columbus (Tr. 1482-1609). In view of the unsettled nature of the Secretary's position, the court will disregard the charges as they relate to connectors while moving in steel. The ultimate issue can be determined on the basis of other evidence in the case.

when employees were not otherwise protected. It was a method recognized as practical by Compliance Office Dill and the three experts appearing in the case, all of whom testified the method was in general use throughout the industry. Except for ironworkers, the method was actually followed by most of respondents' employees when their foremen and supervisors insisted the policy be followed.[23] The court finds as a fact that the use of safety belts and lanyards was a practical means of protecting employees from fall hazards encountered on the project.

It is further found as a fact:

(1) Many of respondents' employees engaged in bolting up, installing ladders and leveling angles, and in moving point-to-point along the main trusses and floor beams of the bridge, were not tied off for significant periods while performing these tasks exposing them to fall hazards.[24]

(2) The corporate respondents had knowledge of these violations through the imputed knowledge of their supervisors and foremen.

(3) Respondents did not establish defenses of

---

[23] See testimony of Brandt, carpenter foreman, whose crew was always hooked to rat lines (Tr. 1701-1704) and had no problem following the companies' tie-off policy (Tr. 1707-1711). See also testimony of James Phillips, Tri-State ironworker foreman, who enforced the tie-off rule and insured the rule was followed by his crew (Tr. 1805-1806).

[24] The record is replete with examples of violations. See Appendix A attached to the Secretary's posthearing brief which verifies, by transcript reference, the numerous incidents of violations.

either unpreventable employee or foreman misconduct for the reasons discussed in connection with Serious Citation No. 1, item 1(a), *i.e.*, the respondents failed to show the violations were unpreventable; the work rules were "adequately communicated and effectively enforced;" or that its "supervisors were adequately supervised."

WILLFUL CITATION NO. 2

Classification and Penalties

In *Falcon Steel*,[25] *supra*, the Commission, quoting *O'Horo, supra*, described a willful violation as one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." It further noted:

> A willful violation is differentiated from others by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. Logically, then, a willful charge is not justified if an employer has made a good faith effort to comply with a standard or

---

[25] The court notes the Commission found in *Falcon* the violations regarding ironworkers' failure to use belts was "serious" rather than "willful" under the facts of that case. The Commission explained, however, upon a showing of obstinate indifference to employee safety, a willful violation would be affirmed. 16 OSHC at 1195. This court believes such a showing has been made in this case.

> eliminate a hazard, even though the employer's efforts are not entirely effective or complete. *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). The test of good faith for these purposes is an objective one – whether the employer's belief concerning a factual matter or concerning the interpretation of a rule was reasonable under the circumstances.

It is concluded from the record that respondents' top management, mid-line supervisors, and front-line foremen were aware of the fall hazards presented when employees were engaged in the activities described in the Secretary's citations. They were fully aware of the tie-off rule devised by respondents' safety director to protect these employees and knew this rule was not followed in practice by a significant number of employees. Despite repeated warnings from the safety director that the rule was being ignored, respondents assumed an attitude of indifference and took no effective steps to enforce the rule until after the accident occurred. This constitutes willful conduct, and the Secretary's charges are affirmed as willful.

The court has considered but rejects respondents' contention that they acted in good faith. The only person on respondents' management team who showed any genuine concern for employee safety was the safety director who did not receive adequate support or authority from respondents to insure the safety rules were followed. The corporate respondents' conduct can only be characterized as one of "obstinate indifference" to employee safety.

Under current statutory criteria, employers who willfully violate the Act can be assessed up to $70,000 for each infraction.[26] In these cases, the Secretary has proposed aggregate penalties for items 1(a) and 1(b) totaling $70,000 in the case of National and $42,000 in the case of Tri-State. While the record in this case justifies substantial penalties, the court concludes the Secretary's proposals are excessive.

As noted above with regard to item 1(a), the Secretary, in view of *Dravo, supra*, did not sustain his failure-to-instruct charge except as it relates to employees who were not instructed in the proper use of retractable lanyards. This circumstance must be taken into account and requires an appropriate penalty reduction.

The Secretary allowed Tri-State a 40 percent reduction due to its small size but allowed no other reductions to either respondent based upon good faith, gravity of the violation, or previous history. This court is in general agreement with the Secretary's assessment. For reasons already expressed, a reduction based upon good faith is out of the question in this case. The gravity factor must be rated high due to the number of employees exposed and the consequences which would result from a fall in excess of 25 feet. Likewise, the record reflects National, the parent company of Tri-State, was previously cited for violations of § 1926.21(b)(2) and § 1926.105(a), which citations were affirmed by the Commission in 1987 and 1988 (Exhs. C-39, C-40). The § 1926.105(a) violation affirmed in 1987 was classified as

---

[26] See 29 U.S.C. § 666(a) and (c), as amended, Pub. L 101-508, Title III, Section 3101, 104 Stat. 1388-29 (1990).

willful and carried a penalty of $9,000 (Exh. C-39).

In view of the foregoing, aggregate penalties in the following amounts are considered appropriate:

In Docket No. 92-1550 - $50,000
In Docket No. 92-1551 - $30,000

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing constitutes the court's findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

It is hereby ORDERED:

(1) Serious Citation No. 1, items 1(a) and 1(b), are affirmed and aggregate penalties are assessed as follows:

In Docket No. 92-1550 - $ 7,000
In Docket No. 92-1551 - $ 4,200

(2) Willful Citation No. 2, items 1(a) and 1(b), are affirmed and aggregate penalties are assessed as follows:

In Docket No. 92-1550 - $50,000
In Docket No. 92-1551 - $30,000

/s/ Edwin G. Salyers
EDWIN G. SALYERS
Judge